Supreme Court, U.S.
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No. 01-807

# IN THE SUPREME COURT OF THE UNITED STATES

PHEASANT BRIDGE CORP.,
Petitioner

v.

THE TOWNSHIP OF WARREN,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of New Jersey

## RESPONDENT'S BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING

## RESPONDENT

Respondent Township of Warren is a municipal entity situated in Somerset County, New Jersey. The Township was formally established in 1806.

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BRIEF IN OPPOSITION TO

PETITION FOR CERTIORARI

Respondent Township of Warren respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of New Jersey.

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## COUNTER-STATEMENT OF THE CASE

The Township of Warren is a municipality located in Somerset County, New Jersey. Its northern border is formed by the Passaic and Dead Rivers. Historically, the properties abutting the rivers were either vacant or utilized for agricultural purposes.

In New Jersey, zoning and land use powers are delegated to municipalities under the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq.. The Municipal Land Use Law is comprehensive, and requires each municipality to establish a Master Plan to guide the use of lands within the municipality. N.J.S.A. 40:55D-28. In 1988, the Warren Township Planning Board undertook the required re-examination of the Warren Township Master Plan pursuant to N.J.S.A. 40:55D-89. The new Master Plan, published and adopted in January

1990, had, among other things, a renewed focus on the recognition of environmental issues, conditions and problems which had become pronounced within the Township. (Pet App 30). The Master Plan undertook an evaluation to determine what areas of the Township were suitable for normal development, and which portions were not suitable for anything but lower density development. In that vein, the 1990 Master Plan recommended the establishment of an EP-250 zone in the northern tier of the Township coinciding with that section of the Township characterized by large lots which were primarily undeveloped or utilized for agricultural purposes. The tracts within the proposed zone were typically constrained by specified environmental factors, including open water, wetlands and wetlands buffers, steep slopes, flood plains, and a zero to one foot depth to seasonal high water table. The new zone would replace an existing zone which permitted, among other things, residential development based on a 1 ½ acre minimum lot size. Petitioner Pheasant Bridge owned a 28.9 acre undeveloped lot located within the proposed EP-250 zone. The property abutts the Passaic River and was subject to potential flooding. (Pet App 30). Petitioner had acquired the lot in 1986, and used it for production of hay. (Pet App 30). At no time during its period of ownership had Pheasant Bridge obtained any development approvals. In fact, Petitioner had,

prior to trial of the within matter, withdrawn its application to the New Jersey Department of Environmental Protection for a Wetlands Letter of Interpretation, a necessary prerequisite to any development on the site. Petitioner conceded at the trial level that a significant portion of the tract is consumed by wetlands, but it presented no evidence at trial to establish the extent or delineation of the wetlands on the site. (Pet App 87).

In October 1993, Respondent introduced Ordinance 93-24, the zoning ordinance substantially implementing the changes recommended by the adopted Master Plan. The proposed ordinance included the creation of the EP-250 zone, which was to consist of over 800 acres of land abutting the rivers. The introduction of the ordinance was published consistent with law. The Municipal Land Use Law contains a Protest provision by which a protest against any proposed amendment or revision of a zoning ordinance may be filed with the Municipal Clerk signed by the owners of 20 percent or more of the area within the proposed changed zone, or of the lots essentially abutting the zone. N.J.S.A. 40:55D-63. No protest was filed by Petitioner or any other property owners affected by the proposed creation of the EP-250 zone.

After public hearing, Ordinance 93-24 was adopted by the Warren Township Committee on December 2, 1993. The ordinance created the new EP-250 zone, which established a

minimum lot size of six acres. The permitted uses within the EP-250 zone included farming and single-family detached dwellings, the use for which the Pheasant Bridge property was being used at the time, as well as its intended use if Petitioner obtained development approval. Ordinance 93-24 did not, of course, only establish the EP-250 zone. The zoning ordinance was a comprehensive re-evaluation of land use planning within the Township, a proposition which was not disputed at the trial level. Consistent with the Master Plan, the ordinance established several new zones, including other residential zones having smaller lot size requirements.

After the passage of Ordinance 93-24, Petitioner filed an Action in Lieu of Prerogative Writs in the Superior Court of New Jersey, Law Division, Somerset County. There, Petitioner alleged that the provisions of the EP-250 zone were invalid facially and as applied, and constituted a taking as the regulations operated "to deprive the plaintiff of substantially all of its beneficial and economic use of its aforesaid lands". Respondent defers to the New Jersey Supreme Court Opinion for the essential procedural history of the Court action. However, it is significant that during the course of the trial, Petitioner conceded that it could not establish how many lots could actually be developed on the tract under the former one and a half acre zoning scheme. It also conceded that it could not establish the extent of

wetlands present on the tract, and had voluntarily withdrawn its application to the New Jersey Department of Environmental Protection for a delineation of the wetlands on the site. Consequently, the Petitioner did not prove any damages, or any actual diminution of value or use of the property, although it continued to assert a "theoretical" loss.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE DECISION OF THE NEW JERSEY SUPREME COURT IS COMPLETELY CONSONANT WITH THE DECISIONS OF THIS COURT, AND CORRECTLY FOUND NO TAKING OF THE PROPERTY HAD OCCURRED.

Petitioner contends that the New Jersey Supreme Court's decision is in conflict with Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138 (1980), and other United States Supreme Court cases. However, the decision is entirely consistent with current case law, and reached a result required by the facts of the case.

First, the New Jersey Supreme Court's decision necessarily took into account the specific facts of this case. It is clear that Petitioner did not and could not assert that it was deprived of substantially all use of its property after the passage of the ordinance. Ordinance 93-24 permitted Pheasant Bridge to develop its tract for residential uses, the same use which it purportedly wished to pursue under the former ordinance. Rather than depriving Petitioner of

the use of the property, the ordinance simply reduced the density at which the property could be developed for the desired use. In addition, Petitioner had not established the extent to which it could develop its property under the former ordinance It had not filed a Protest after the challenged ordinance was introduced, and there had been no administrative proceeding below by which the Township was made aware of the specific characteristics of Petitioner's tract which would have made the tract's exclusion from the EP-250 zone rational. Even after the ordinance was passed, Petitioner sought no review or relief from the governing body, but filed its Complaint in Superior Court of New Jersey.

The New Jersey Supreme Court found, essentially, the otherwise valid land use regulations established under the EP-250 zone did not rationally advance the ordinance's stated purpose when applied to the Petitioner's specific property. The Court therefore concluded that the zoning ordinance was arbitrary, capricious, and unreasonable as applied to the plaintiff's property only. The Petitioner was thus granted relief from the ordinance in the only forum in which Petitioner had sought that relief.

The New Jersey Supreme Court's conclusion that, under the facts of the case, Petitioner was not entitled to damages as a remedy for the "temporary taking" during the period between the adoption and the as applied invalidation of the EP-250 zone is completely consistent with Agins, *supra* and the other cases which Petitioner urges conflict with the New Jersey decision.

Petitioner repeatedly cites to the Agins principal that "the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate State interests, see Nectow v. Cambridge, 277 U.S. 183, 188, 48 S.Ct. 447, 448, 72 L.Ed. 842 (1928), or denies an owner economically viable use of his land, see Penn Central Transportation Company v. New York City, 438 U.S. 104, 138, N. 36, 98 S.Ct. 2646, 2666, 57 L.Ed. 2d 631 (1978)." There is nothing in the New Jersey Supreme Court Opinion which fails to comport with Agins. Agins involved a challenge to an ordinance enacted by the City of Tiburon, California, which placed the plaintiff's five acre tract in a zone restricted to one-family dwellings, accessory buildings and open space uses and prohibited construction until the owner submitted

development plans compatible with "adjoining patterns of development and open space". Agins, 447 U.S. at 257, 262. The density restrictions permitted the property owners to build between one and five single-family residences on their five acre tract. The plaintiffs there filed a Complaint against the City seeking damages for inverse condemnation and declarations that the zoning ordinances were facially unconstitutional. The gravamen of both claims was the plaintiffs' assertion that the City had taken their property without just compensation in violation of the Fifth and Fourteenth Amendments.

This Court in Agins found that no taking had occurred under any theory advanced by the plaintiffs there. The Agins Court acknowledged that the ordinance did regulate and restrict the developability of the plaintiffs' property, although there was no physical invasion of the property by the City. The Agins Court articulated a balancing test between the private and public interests involved, and concluded that the ordinances satisfied the Constitutional requirements.

Although the New Jersey Supreme Court found Warren Township's ordinance to be arbitrary and capricious as applied to the plaintiff's property, that finding does not establish a compensable taking under the Agins test. In Agins, the plaintiffs had not submitted a plan for the development of the property, and therefore this Court found no concrete controversy regarding the application of the specific zoning provision. While the Court ultimately found that the ordinance in question did not work a taking of the property in question, it found that the plaintiffs' temporary inability to sell or develop their property during the later-abandoned condemnation proceeding instituted by the City also was not a taking as "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership' which cannot be considered as a taking in the constitutional sense." Agins, *supra*, 447 U.S. at 263. [Fn. 9]. It was thus clear that the Agins decision correctly recognized that the course of normal land use regulatory activities may in fact result in temporary restrictions on a property owner's use of his property, which restrictions neither constitute a taking of the property, nor a deprivation of a recognized Constitutional right.

This holds particularly true in this case where the property owner sought no relief at any municipal level prior

to instituting the Court action. Consequently, there was no body of information available to the Township at that time to warrant the Pheasant Bridge tract's exclusion from the EP-250 zone which was specifically designed to address the large, undeveloped properties along the Passaic River which typically contained environmental constraints. As no taking would presumably occur had Petitioner filed for and subsequently obtained an exclusion or relief from the EP-250 zone regulation, it necessarily follows that no taking occurs when that relief is first sought and obtained in Court. For that reason, the New Jersey Supreme Court correctly concluded that "we see no distinction justifying the need to provide for interim monetary damages between regulatory delay in securing a change in, or variance from, a zoning ordinance and delay occasioned by resort to judicial process to challenge application of a zoning ordinance to one's property. (Citations omitted)." Pheasant Bridge, 169 N.J. at 298. (Pet App 16). That conclusion is supported by the entire body of case law cited by the Court. Thus, there is neither need nor basis for review of the New Jersey Supreme Court decision here.

## II. THE NEW JERSEY SUPREME COURT DECISION DOES NOT CONFLICT WITH FIRST ENGLISH.

Petitioner also urges that the New Jersey Supreme Court decision somehow contravenes this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987). That is nothing but wishful thinking. The facts of this case are so clearly distinguishable from those in First English that First English provides absolutely no support for Petitioner's position. First of all, in First English, the landowner alleged in its Complaint that the challenged ordinance had denied it "all use of its property" and the Supreme Court expressly limited its holding to such facts. 482 U.S. at 320. Quite obviously, the Pheasant Bridge situation was different, as Ordinance 93-24 simply reduced the number of lots which could presumably be developed following appropriate subdivision application. By contrast, the First English ordinance effectively denied the plaintiff the right to construct or reconstruct *any* building in an interim flood protection area after a flood destroyed that plaintiff's existing campground. In rejecting the California policy of refusing to provide any damages for temporary or regulatory takings, the United States Supreme Court in First English

held that the plaintiff landowner in that case could recover damages for the period before a land use regulation is finally determined to constitute a taking. However, the Court expressly limited its holding to the specific facts of the First English case. The Court declined to address "the quite different questions which would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like...". 482 U.S. at 321 (emphasis added). Therefore, this Court acknowledges that the normal course of municipal zoning, which necessarily includes periodic zoning changes, certainly does not automatically result in a "takings claim" whenever the zoning change impacts on the extent of the development of property, even if relief from the regulations is later obtained by the property owner.

First English certainly acknowledges that municipal governments simply cannot be held liable for damages of any kind due to a temporary heightened development regulation which is enacted during the course of establishing a valid land use regulatory scheme, even when the heightened regulation is thereafter found to be unreasonable as to a particular property. To hold otherwise would destroy any municipality's ability to zone on a district-wide basis, forcing the municipality to either inventory each tract within its borders before adopting any land use plan in order to avoid

potential financial ruin, or abandon any meaningful comprehensive zoning altogether.

Lastly, Petitioner contends that this case is "ripe" for adjudication by this Court. The issue of this case's ripeness is distinct from whether the Petitioner exhausted available administrative remedies so as to allow for a takings claim. See Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 192-93 (1985). Petitioner here had administrative remedies available from which relief could be obtained. The New Jersey Municipal Land Use Law contains a Protest provision which allows property owners to protest a change in a zoning ordinance. N.J.S.A. 40:55D-63. Even after the new zoning ordinance was passed, the Petitioner had a procedural right to petition the Warren Township Planning Board for a recommendation that the property be relieved from the regulations of the EP-250 zone. Feiler v. Fort Lee Board of Adjustment, 240 N.J. Super. 250, 256-57 (App. Div. 1990), certif. denied, 127 N.J. 325 (1991). By taking that route, Petitioner would have created a record at the municipal level by which the Township could either grant or deny the Petitioner's request for relief. That plaintiff here was permitted to seek relief from the EP-250 requirements in the Court system as a forum of first resort does not mean that the Petitioner's choice to so proceed does not affect its takings argument. The Petitioner here did not

provide Warren Township with the opportunity to issue a "final decision" required under Williamson, supra.. Under these facts and circumstances, the plaintiff's takings claim is defective. The New Jersey Supreme Court correctly found no basis for a takings claim.

## CONCLUSION

The petition for writ of certiorari should be denied. The New Jersey Supreme Court's decision was based upon an accurate evaluation of the law in light of the specific facts of this case. The decision is consistent with Agins v. City of Tiburon, *supra*, and is not in conflict with any other decision of this Court. This case requires and deserves no further review.

Respectfully submitted,

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